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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 259.

ARNOLD BERNSTEIN, also known as Arnold M. Bernstein,

Petitioner,

—against—

N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, also known as Holland-America Line,

Respondent.

BRIEF FOR RESPONDENT, N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, ALSO KNOWN AS HOLLAND-AMERICA LINE, IN OPPOSITION TO PETITION FOR CERTIORARI.

ROSCOE H. HUPPER,
Attorney for Respondent, N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, also known as Holland-America Line.

JOHN L. GALEY,
Of Counsel.

New York, N. Y., September 6, 1947.

THE COURT PRESS, N. Y. C.

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The only question presented by the decision of the Circuit Court of Appeals is whether that Court had jurisdiction to entertain an appeal by the plaintiff from an order of the District Court under Rule 14(a) of the U. S. Rules of Civil Procedure, permitting the defendant to implead a third party pursuant to an obligation to indemnify the defendant.

The decision of the Circuit Court of Appeals dismissing the appeal does not present any question whatever of diversity amongst the decisions of the various Circuits or any unusual or doubtful question of procedure.

The order appealed from was plainly not a final decision within the meaning of Section 128(a) of the Judicial Code (28 U. S. C. Sec. 225).

The plaintiff, a stockholder in a German corporation (assuming that he had the right as such to bring a suit in the right of the corporation but for his personal benefit), sued the defendant, a Dutch corporation, for conversion of two ships and other property of the German corporation alleging that they came into the possession of the defendant after the plaintiff had assigned his stock in the German corporation to a third person under duress of which plaintiff should have had knowledge. Plaintiff also in other causes of action sued for personal recovery of the ships and property or their value in case they could not be delivered, for damages for their detention by defendant, and for money had and received by the defendant by way of insurance on one of the vessels and the alleged sales proceeds of the other.

The defendant moved for leave under Rule 14(a) of the Rules of Civil Procedure, to make Chemical Bank & Trust Company, a New York corporation, a third party, alleging in substance that the Bank had taken the vessels in consideration of the discharge of the indebtedness of the German corporation to the Bank, had then transferred the vessels to the defendant and, in doing so, had warranted the title to the vessels and its power to convey them, had warranted quiet possession thereof to the defendant and had represented to the defendant that the persons making the conveyances in behalf of the corporation had authority to do so.

The third party complaint charged the Bank only with liability to the defendant. No attempt was made to make the Bank a co-defendant on the basis of liability to the plaintiff.

The motion for leave to implead the Bank was granted over the plaintiff's opposition and the plain-

tiff thereupon appealed to the Circuit Court of Appeals. A motion by the defendant to dismiss the appeal on the ground that the order of the District Court was not a "final decision" under Section 128(a) of the Judicial Code (28 U. S. C. §225(a)), was granted by the Circuit Court of Appeals. The plaintiff thereupon filed the present petition. The case has not yet been tried.

The petitioner does not cite any decisions holding or suggesting that an order permitting the impleader of a third party is appealable as a final decision. The following passage from *1 Moore's Federal Practice* (p. 749) has, so far as we can ascertain, never been questioned:

> "Where the defendant's motion to implead a third-party is denied, the order would not be appealable, since Rule 14 places the grant or denial of such a motion in the discretion of the court. Even if an abuse of discretion could conceivably be shown, still the order denying impleader would not be appealable, inasmuch as it does not finally dispose of any rights of the defendant. *If the defendant's motion to implead a third party was granted, over the plaintiff's objection, the plaintiff could not appeal from such an order since it is not a final order in any sense.*" (Emphasis ours.)

The decision in *Catlin* v. *United States,* 324 U. S. 229, referred to in the brief opinion of the Circuit Court of Appeals, like the present case, involved an application of Section 128 of the Judicial Code. The appeal there was from a judgment in a condemnation proceeding decreeing that title to property of a pri-

vate person vested in the United States upon the filing of a Declaration of Taking by the Secretary of War under the Declaration of Taking Act of February 26, 1931. This Court, in affirming the decision below dismissing the appeal on the ground that the judgment was not a final decision, said:

> "Their right to appeal rests upon §128 of the Judicial Code. This limits review to 'final decisions' in the District Court. A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28. * * * The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piecemeal litigation. 'The case is not to be sent up in fragments. . . .' *Luxton* v. *North River Bridge Co.,* 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals" (pp. 233-4).
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> "* * * But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. *Cf. Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21. See also *Dieckmann* v. *United States,* 88 F. 2d 902" (p. 236).

The decisions in *Ray* v. *Law,* 3 Cranch 179; *Forgay* v. *Conrad,* 6 How. 201 and *Thomson* v. *Dean,* 7 Wall. 342, stressed in petitioner's brief, have absolutely nothing to do with the case. They were all decisions where the appeals were from decrees deciding the

right to property in contest, entitling the plaintiff to have the decree carried immediately into execution and only leaving to be adjusted accounts between the parties pursuant to the decree.

The numerous decisions in the various Circuits dealing with the question as to what constitutes a final decision fully support the decision of the Circuit Court of Appeals.

It has frequently been held that an order adding parties to an action is not a final order and is not immediately appealable. *Kummer* v. *United States,* 148 F. (2d) 191 (C. C. A. 6, 1945); *U. S.* v. *Weekly Publications,* 144 F. (2d) 186 (C. C. A. 2); *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282, 290; *Central California Canneries* v. *Dunkley Co.,* 282 Fed. 406, 410 (C. C. A. 9).

Among the many decisions holding orders not final which do not determine plaintiff's rights and involve a continuation of the litigation are the following:

Frank Mercantile Corp. et al. v. *Prudential Ins. Co. of America,* 115 F. (2d) 496 (C. C. A. 3); *Drydock E. B. & B. R. Co.* v. *Peckham,* 261 Fed. 988 (C. C. A. 2); *Florini* v. *Stegner,* 82 Fed. (2d) 708 (C. C. A. 3) (orders granting a new trial made in the case in which the trial occurred); *Rodriguez* v. *Arosemena et al.,* 91 F. (2d) 219 (C. C. A. 5) (a judgment overruling a demurrer to the jurisdiction); *The Maria,* 67 F. (2d) 571 (C. C. A. 2) (denial of motion to dismiss libel for lack of admiralty jurisdiction); *Pearson* v. *Higgins,* 34 F. (2d) 27, 28 (C. C. A. 9) (order sustaining jurisdiction of the Bankruptcy Court in a summary proceeding); *Arthur* v. *Edmonds,* 66 F. (2d) 21 (C. C. A. 5); *Patten* v.

Cilley, 50 Fed. 337 (C. C. A. 1); *Klein* v. *Wilson*, 7 F. (2d) 777 (C. C. A. 3) (orders denying motions to remand on the ground that diversity was lacking); *Loufakis* v. *United States*, 75 F. (2d) 627 (C. C. A. 3) (order sustaining jurisdiction in a deportation case to compel witness to testify); see also *Bender* v. *Penn R. R. Co.*, 148 U. S. 502 and *McLish* v. *Roff*, 141 U. S. 661 (the first case holding not final an order denying a motion to remand and the second holding not final an order overruling a demurrer to the jurisdiction based on alleged lack of diversity).

In *Oneida Navigation Corp.* v. *W. & S. Job & Co., Inc.*, 252 U. S. 521, where the question was as to the jurisdiction in admiralty under Rule 56 of the Admiralty Rules over the claim contained in a petition impleading a third party, this Court said:

> "The petition to make W. & S. Job & Co. Inc., a party defendant was merely an incident in the progress of the case in the District Court."

The petition should be denied.

Respectfully submitted,

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JOHN L. GALEY,
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New York, N. Y., September 6, 1947.